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89- 1395

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

STEPHEN BARNHART,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the statute of limitations of 28 U.S.C. 2401 is tolled by the incompetence of Stephen Barnhart when the drugs administered by the Veterans Administration were responsible for Barnhart's incompetence and inability to bring a claim against the V.A.

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IN THE

SUPREME COURT OF THE UNITED STATES

STEPHEN BARNHART,	)
	)
Petitioner,	)
	)
vs.	)
	)
UNITED STATES OF AMERICA,	)
	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Stephen Barnhart respectfully petitions this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the Court's holding that Barnhart's claim was untimely and did not fit within the recognized tolling categories under the Federal Tort Claims Act.

OPINIONS BELOW

The United States District Court

for the Southern District of Indiana entered judgment in favor of Respondent United States of America. (Appendix) The United States Court of Appeals for the Seventh Circuit affirmed the District Court opinion. (Appendix) The Seventh Circuit denied appellant's Petition for Rehearing on October 17, 1989. (Appendix)

JURISDICTION

The Court of Appeals rendered the decision affirming the District Court's Judgment in favor of respondent on August 31, 1989, and denied petitioner's timely Petition for Rehearing on October 17, 1989. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. section 1254(1).

STATUTES INVOLVED

28 USC 2401. Time for commencing action against United States.

(a) Except as provided by the Contract Disputes Act of 1978, every

civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered *mailof notice of final denial of the claim by the agency to which it was presented.

28 USC 2675. Disposition by federal agency as prerequisite; evidence.

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed, shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall

not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, crossclaim, or counterclaim.

STATEMENT OF THE CASE

Stephen Barnhart filed suit against the United States of America alleging medical malpractice by the Veteran's Administration. The United States filed a motion for summary judgment claiming that Barnhart's claim under the Federal Tort Claims Act is barred by the two year administrative statute of limitations provided in 28 USC 2401(b). The Motion for Summary Judgment was converted to a Motion to Dismiss, pursuant to Rule 12(b)(1) Fed. R. Civ. P. After submission of evidence and argument, the District Court granted the motion to dismiss pursuant to Rule 12(b)(1). Jurisdiction of the U. S. District Court was based on 28 U.S.C. 1346(b) and 28 U.S.C.

2675.

STATEMENT OF THE FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Stephen Barnhart is a single white male who was born on March 15, 1949. His psychiatric history began in 1968 following the death of his sister in an automobile accident. He was diagnosed as schizophrenic and given Thorazine at a V.A. facility at least as early as 1969. Over the next twelve years he continued to be treated with Thorazine in doses reaching four hundred to eight hundred mg/day and occasionally more. Although there were occasionally breaks in treatment, Barnhart was taking the drug most of the time. The discharge summary from the San Diego V.A. indicated that he had a ten year history of treatment with "Large doses of major tranquilizers, usually Thorazine." Dr. Breggin stated that this is more than sufficient to cause tardive dyskinesia.

Barnhart was hospitalized more than a dozen times during the period of 1968 thorough 1981, usually on V.A. psychiatric services. He was evaluated 100% psychiatrically disabled from the V.A.. Not until 1983 is there an open acknowledgement in the V.A. record that the patient has tardive dyskinesia. On February 8, 1983, on a medical certificate, Dr. Tyler states "was on Thorazine for years (800 to 1000 mg/day)" and has severe tardive dyskinesia." On May 4, 1983, on a medical certificate, Dr. Joseph Casey states the patient has "tardive dyskinesia, severe.) There is no indication according to Dr. Breggin who reviewed the medical records that Barnhart was told. Stephen Barnhart was seen privately by a neurologist, Charles Rehn, who wrote to his attorney, Mr. Fairchild, on July 13, 1983, that the patient has "severe tardive dyskinesia from major tranquilizer therapy

for schizophrenia in the past." Dr. Peter Breggin, a psychiatrist, described Barnhart's condition as follows:

> ...Mr. Barnhart has also developed many symptoms of mental deterioration typical of organic brain disease associated with tardive dyskinesia. Mr. Barnhart shows typical early signs of dementia with various impairments of his intellectual functions.
>
> The impairments include the following typical pattern:
>
> (1) Difficulty concentrating, focusing his attention, or keeping his mind on one thing at a time. As a result, his tends to ramble and to lose the drift of his own conversation.
>
> (2) Difficulty planning ahead, anticipating the future, or handling complex decisionmaking. He becomes tentative, confused, and uncertain when talking about complex or major decisions or the future.
>
> (3) An amnestic syndrome with short term memory impairment and retrograde amnesia. The short term memory impairment consists of forgetting recent routine information, such as why he entered a room, where he put something, what he was talking about, what he had for breakfast, etc. This reflects an ongoing defect in learning, memorizing, and/or recalling. Typical of the disorder, he sometimes recalls recent events with clarity, but at other times, loses them completely. He also has retrograde amnesia, or the loss of prior memories. In typical fashion, the loss is most extreme for the period of trauma when he was taking the offending medication, and then reaches back further into the past in a spotty fashion.

(4) Emotional instability, especially increased irritability. This could be compounded by psychological problems, but in this context also fits into the pattern of impairment symptom of organic brain disease, such as tardive dementia.

Mr. Barnhart does have the initial symptoms of dementia. Electroshock therapy which he received many years earlier could be an additional contributing factor. However, the patient's earlier hospital records, long after the electroshock treatment, show no signs of mental deterioration of this kind. The impairment is recent, corresponding in time with the tardive dyskinesia, and is therefore predominantly and probably entirely drug related. (emphasis added) It is not unusual for patients to be kept on drugs for long periods of time with continuous psychotic symptoms, only to find the symptoms have actually been worsened by the prolonged drug therapy. Major tranquilizers can cause or exacerbate psychotic symptoms. The syndrome is called tardive psychosis.

Dr. Breggin concluded that Barnhart's tardive dementia, a deteriorating process, has in itself been sufficient to render him incompetent to handle his affairs or to bring a legal action on his own behalf. Dr. Breggin further concluded that as a result of Barnhart's severe psychiatric disorders, his tardive dyskinesia and his

tardive dementia, he has at no time been able to handle his own affairs or interests over the past many years since his diagnosis of tardive dyskinesia.

Dr. Breggin concluded that the V.A.was grossly negligent and that the drug-induced neurological disorder tardive dyskinesia was the result of the V.A.'s treatment.

On March 22, 1985, Barnhart filed an action in Federal Court against Smithkline Beckman Corporation, a manufacturer of the drug Thorazine. However, Barnhart would not allow his counsel to file a claim against the V.A. until January of 1987. Dr. Breggin was instrumental in convincing Barnhart of file a claim against the V.A. Without his assistance, Barnhart would not have filed the claim against the V.A. Barnhart's incompetence prevented him from giving his

consent. Barnhart was an adult incompetent without a guardian.

On February 2, 1987, Barnhart filed an administrative tort claim with the V.A. On JaNuary 19, 1988, the V.A. denied the claim. On March 8. 1988, Barnhart filed the District Court action which is the subject of this appeal.

REASONS TO GRANT THE WRIT

The Seventh Circuit in its opinion discussed the "discovery" rule and the "exception" recognized by the Eighth, Ninth and Tenth Circuits:

> Barnhart's argument for tolling the administrative statute of limitations rests on an established exception to the so-called "discovery" rule. The "discovery" rule decrees that a cause of action under the Federal Tort Claims Act begins to accrue when a plaintiff discovers or should have discovered the cause of his or her injury. Drazan v. United States, 762 F.2d 56, 58-59 (7th Cir., 1985); see also United States v. Kubick, 444 U.S. 111 (1979). The Eighth, Ninth and Tenth Circuits have recognized an exception to the rule where the very injury of which a plaintiff complains prevents him or her from being

aware of that injury. Washington v. United States, 769 F. 2d 1436 (9th Cir. 1985) (coma); Clifford by Clifford v. United States, 738 F. 2d 977 (8th Cir. 1984)(coma); Zeidler v. Untied States,, 738 F. 2d 527 (10th Cir. 1979) (mental incapacity due to frontal lobotomy). See also McDonald v United States, 843 F. 2d 247, 248-40 (6th Cir. 1988) and cases cited therein (discussing variations on this exception to discovery rule, tolling statute for period of patient's "blameless ignorance"); Albertson v. T.J. Stevenson & Co., 749 F. 2d 223, 230 (5th Cir. 1984); Phillips v Purdy, 617 F 2d 139, 140-41 (5th Cir. 1980).

The Seventh Circuit in our case failed to correctly apply the "exception" after assuming that Barnhart's specific reluctance to proceed against the V.A. resulted in some way from his tardive dyskinesia (caused by the drugs administered by V.A.). The conflict between the Seventh, the Eighth, Ninth and Tenth Circuit interpretations of the "exception" to the discovery rule need to be resolved. The great personal loss of Steve Barnhart has been recognized by both the Seventh Circuit

and District Courts.

"As the district court has already noted, this case presents a most unfortunate situation which regrettably, we cannot remedy at this late juncture."

To allow the V.A. to benefit from its causing Barnhart's inability to bring a timely action against the V.A. is not a proper interpretation of the discovery rule.

CONCLUSION

The drugs administered to Barnhart have prevented him from bringing a timely claim against the V.A. and, therefore, he should fit within the exception to statute of limitations. Petitioner accordingly respectfully requests that this petition be granted and that the issues raised herein be set for the full consideration they deserve.

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 88-3402

STEPHEN BARNHART,

Plaintiff-Appellant,

V.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Indiana,
Indianapolis Division.
No. IP 88-274-C-**Sarah Evans Barker, Judge.**
ARGUED JUNE 8, 1989-DECIDED AUGUST 31, 1989

Before **BAUER**, Chief Judge, **CUDAHY** and **KANNE**, Circuit Judges.

CUDAHY, Circuit Judge. As the district court has already noted, this case presents a most unfortunate situation which,

regrettably, we cannot remedy at this late juncture. The plaintiff in this case, Stephen Barnhart, suffers from tardive dyskinesia, an irreversible neurological condition brought on by the use of certain tranquilizers for an unduly long period of time. Barnhart took large doses of these medications over an extended period at the instruction of physicians at various Veteran's Administration ("VA") hospitals. By the time Barnhart's condition was discovered, he had suffered debilitating and irreversible damage. The VA considers Barnhart to be 100% disabled by virtue of his tardive dyskinesia, in combination with some lingering schizophrenic symptoms. Unfortunately, Barnhart delayed in bringing any action or claim against the VA because he was afraid that the VA, upon which he felt completely dependent, might retaliate against him. Because of this delay, the VA

denied Barnhart's claim as untimely and the district court dismissed Barnhart's action under the Federal Tort Claims Act as barred by the applicable administrative statute of limitations. Although Barnhart presents a plausible argument for tolling the statute of limitations, his case does not fit within the recognized tolling categories and so must be dismissed. As did the district court we regret the apparent stringency of this result.

I.

Although the government originally filed a motion for summary judgment, it subsequently requested that the court convert the motion to a motion to dismiss for want of subject matter jurisdiction. The district court, following guidance given by this court in Crawford v. United States, 796 F.2d 924, 928-30 (7th Cir. 1986), granted the government's request. Crawford presented

a nearly identical jurisdictional problem under the Federal Tort Claims Act.

We noted that such preliminary jurisdictional matters are appropriately dealt with as motions to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Further, as we observed in Crawford, the motion to dismiss may be supported by whatever documents might be necessary to resolve the jurisdictional problem; an evidentiary hearing may be held if necessary. Id. at 928-29; see also Wheeler v. Hurdman, 825 F.2d 257, 259 n.5 (10th Cir. 1987) ("a 12(b)(1) motion is considered a 'speaking motion' and can include references to evidence extraneous to the complaint"). The district court in the case before us did indeed hold a hearing, and thoroughly explored the issues in a most careful and commendable fashion.

We summarize only the pertinent facts;

we rely upon the discussion in the district court's opinion for further detail. Barnhart v. United States, No. IP 88-274-C (D.Ind. Nov. 28, 1988). We of course would reverse the district court's grant of the government's motion to dismiss if there were any set of facts upon which relief might be granted. Conley v. Gibson, 355 U.S. 41 (1957).

Barnhart began his long history of treatment by the VA in the late 1960's after experiencing a psychotic episode. He was diagnosed as schizophrenic and was given substantial doses of Thorazine, along with a number of other neuroleptic drugs, on an ongoing basis for ten or more years. During that period he was treated by physicians at VA hospitals in Indiana (Indianapolis), Kentucky (Louisville and Lexington) and California (San Diego). During the mid-1970's Barnhart apparently began to

experience involuntary muscle spasms typical of tardive dyskinesia. Although in 1980 physicians at the San Diego facility considered the possibility that these spasms might indicate early tardive dyskinesia, Barnhart and his mother were not informed of that possibility. By 1983 the VA openly acknowledged in its records that Barnhart had "severe" tardive dyskinesia. The government does not dispute that the first time Barnhart was informed of his condition was after he was seen privately by a neurologist, who on July 13, 1983 sent Barnhart's attorney a letter relaying a diagnosis of "severe tardive dyskinesia from major tranquilizer therapy."'[1] Despite this

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[1]1 Tardive dyskinesia is characterized by varying degrees of loss of voluntary musculature. In Barnhart's case the symptoms include frequent blinking and grimacing and involuntary movements of his mouth, jaw, tongue, hands and arms. His inability to control his respiratory muscles also results in labored breathing that inhibits his

notification in 1983, Barnhart did not file a claim with the VA until 1987. In the meantime, however, he did sue the manufacturer of one of the drugs responsible for his condition. This action, filed in 1985 in federal district court, was subsequently settled. In 1988, as part of the process whereby that suit was settled, a guardian ad litem was appointed for Barnhart. Barnhart attributes his failure to take any action against the VA to a mental condition that sometimes accompanies tardive dyskinesia. [2] An affidavit from a physician

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speech and swallowing. He has had to undergo eye surgery to prevent spasms from impairing his vision. Additionally, as of 1986 Barnhart had begun to exhibit symptoms characteristic of an organic brain disease associated with tardive dyskinesia. His schizophrenia is now deemed in remission and apparently never reappeared after his lengthy drug treatment was discontinued.

[2] 2 As we have noted, Barnhart exhibits symptoms of an organic brain disease associated with tardive dyskinesia, tardive

who is an expert on tardive dyskinesia offers support for this conclusion. The affidavit notes that Barnhart suffers from difficulty in concentrating and planning ahead, short term memory impairment, retrograde amnesia and emotional instability. The physician, in a supplemental report, further states that the impact of the disease on Barnhart's mental functioning has been "sufficient to render him incompetent to handle his own affairs or to bring a legal action on his own behalf." Supplemental Report at 5. Among the reasons given for this conclusion are that tardive dyskinesia is often accompanied by denial,

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dementia. This brain disease is newly discovered and not widely accepted in the medical community at this time; for our purposes, we may take as true that Barnhart suffers the symptoms described and that they derive from his tardive dyskinesia condition, whether or not they can be denominated a separate disease.

so that a patient's initial inability to admit that he or she has the disease can be viewed as a part of the disease process. More specifically, the physician noted that Barnhart is fearful of the VA, not only because in Barnhart's view the VA physicians harmed him and might do so again, but also because Barnhart is fully dependent upon the VA for his income and feared that the VA might retaliate should he attempt any sort of malpractice action.

The more general allegations about the impact of the disease on Barnhart's ability to bring any kind of legal action are somewhat undercut by the fact that Barnhart did in fact bring a suit, within the necessary period of time, against the manufacturer of one of the drugs he took. To the extent that tardive dyskinesia involves a denial process that renders patients incapable of recognizing that they have the

disease at all, Barnhart must have been able to overcome that process in time to sue the manufacturer.

Thus the only assertions relevant here are those that provide some explanation why Barnhart's condition made him specifically unable to proceed against the VA. The physician's discussion of Barnhart's particular fears regarding the VA is framed in terms of Barnhart's underlying emotional problem rather than in terms of the specific effects of tardive dyskinesia:

> The patient's emotional problems have remained severe since the diagnosis of tardive dyskinesia, and would in themselves render him unable to bring an action on his own behalf. While I have diagnosed his schizophrenia as "in remission," this merely means that the more extreme manifestations of hallucinations and delusions are no

longer present. As in almost all such cases, the underlying disorder remains in a crippling form. . . . First, Steve remains in his own words "very paranoid." . . . In regard to the Veteran's Administration, he has been especially fearful and paranoid.... In addition.... [h]e has been afraid to bring a legal action against the VA for fear that in retaliation the VA would reject him from all treatment or injure [him] while in treatment. These fears are a product of Steven's financial dependency on the VA, his paranoid character and his actual negative experiences with the VA.... Clearly, while Steve may be labeled as "schizophrenia in remission" he is an emotionally crippled person lacking the autonomy or strength to carry on any kind of stressful or frightening

> activity on his own behalf. This is of course consistent with the fact he receives a 100% psychiatric disability from the VA.

Supplemental Report at 7-9. If we separate for a moment symptoms that are described as associated with Barnhart's pre-existing emotional condition from those described as characteristic of tardive dyskinesia, it would seem from the physician's report that the symptoms specifically responsible for Barnhart's reluctance to sue the VA (most notably, his paranoid symptoms) derive more from his pre-existing emotional condition than from tardive dyskinesia. However, because we review a motion to dismiss, we will consider also the possibility that Barnhart's fear of proceeding against the VA was at least partially a result of the tardive dyskinesia as well.

ii.

The Federal Tort Claims Act opens an exception to the general rule that the United States is immune from suit, permitting recovery against the federal government for torts committed by agents of the government. However, this limited waiver of immunity is subject to a number of conditions, some of which are set out in 28 U.S.C. section 2401:

> (a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.
>
> (b) A tort claim against the United States shall be forever barred unless

> it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . .

Barnhart has arguably met the requirement of section 2401(a). If we take as given that he first learned of his disability in 1983, then the cause of action began to accrue at that time-and he filed his complaint in the district court in March of 1988, easily within the six-year statute of limitations. However, Barnhart did not file a claim with the VA until 1987, four years after the time the claim accrued and two years after the period of limitations specified by section 2401(b) expired.

Although section 2401(a) contains an exception for persons suffering under a "legal disability," section 2401(b) contains no similar provision. However, we noted in Crawford that is difficult to draw any conclusion from this omission, for

subsection (a) refers to a lawsuit in court and "the tolling provision in (a) may simply have been included to avoid the absurdity of telling a person who as a matter of law cannot sue that he must sue or lose his rights." 796 F.2d at 926. Thus the language and structure of the statutory provision by themselves do not foreclose an argument for tolling the administrative statute of limitations set forth in subsection (b).

Barnhart's argument for tolling the administrative statute of limitations rests on an established exception tip the so-called "discovery" rule. The "discovery" rule decrees that a cause of action under the Federal Tort Claims Act begins to accrue when a plaintiff discovers or should have discovered the cause of his or her injury. Drazan v. United States, 762 F.2d 56, 58-59 (7th Cir. 1985); see also United States v. Kubrick, 444 U.S. 111 (1979). The Eighth,

Ninth and Tenth Circuits have recognized an "exception" to this rule where the very injury of which a plaintiff complains prevents him or her from being aware of that injury. Washington v. United States, 769 F.2d 1436 (9th Cir. 1985) (coma); Clifford by Clifford v. United States, 738 F.2d 977 (8th Cir. 1984) (coma); Zeidler v. United States, 601 F.2d 527 (10th Cir. 1979) (mental incapacity due to frontal lobotomy).[3] This is not strictly speaking an exception to the rule, but merely a restatement of the principle that the cause of action will not accrue until the plaintiff could reasonably have been expected to discover the cause of

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[3] 3 See also McDonald v. United States, 843 F.2d 247, 248-49 (6th Cir. 1988) and cases cited therein (discussing variation on this exception to discovery rule, tolling statute for period of patient's "blameless ignorance"); Albertson v. T.J. Stevenson & Co., 749 F.2d 223, 230 (5th Cir. 1984); Phillips v. Purdy, 617 F.2d 139, 140-41 (5th Cir. 1980).

the injury. (A person in a coma cannot reasonably be said to have discovered the cause of the injury just because that cause becomes known by others.) Where the plaintiff was a minor whose parents had a duty to take the initiative in instituting a legal action, or where a plaintiff has an appointed guardian with a similar duty, the plaintiff's incapacity would not appear to be similarly critical. See Crawford, 796 F.2d at 927; Washington, 769 F.2d at 1439; see also Landreth by Ore v. United States, 850 F.2d 532 (9th Cir. 1988). But where, as in Barnhart's case, the plaintiff is an adult with no legal guardian appointed, this approach to the "discovery" rule would permit tolling of the statute of limitations if the condition of which Barnhart complains rendered him incapable of "discovering" the cause of his injury.

As noted, we will proceed under an assumption that seems somewhat dubious from the record-that Barnhart's specific reluctance to proceed against the VA resulted in some way from his tardive dyskinesia (and not from paranoia attributable to his ongoing emotional illness). The question we confront is whether, even adopting the interpretation of the "discovery" rule followed by the Eighth, Ninth and Tenth Circuits, the sort of mental disability under which Barnhart suffers would suffice to toll the statute of limitations. The cases permitting such tolling to date have dealt with mental incapacity rendering plaintiffs incapable of "discovering" or understanding the causes of their injuries. Clifford and Washington involved plaintiffs who were comatose, while Zeidler involved a plaintiff who had two lobotomies. Before

Zeidler, the Tenth Circuit had already ruled that "insanity" would not toll the statute of limitations. Casias v. United States, 532 F.2d 1339, 1342 (10th Cir. 1976). The court in Zeidler took great care to distinguish the kind of incapacity involved in the case before it from "the usual variety of mental disease and legal insanity, that is, a mental disease which constitutes a defense to a criminal offense, for example." 601 F.2d at 530. Specifically, the court in Zeidler focused on the effect of the lobotomies upon the plaintiff's capacity to discover or become aware of the cause of his injury:

"brain damage or destruction is not to be classified in the same way as ordinary mental disease or insanity ... [T]he incapability of the plaintiff to comprehend the elements of possible malpractice, if such existed or exists, should indeed toll

the statute..... Id. at 531; see also Barren by Barren v. United States, 839 F.2d 987, 991-92 (3d Cir. 1988). This focus on awareness or ability to comprehend seems appropriate, given that the issue under the discovery rule is not capability to bring a lawsuit, but rather capability to discover the cause of injury.

If Barnhart was able to proceed against the manufacturer of the drug that injured him at an earlier time, he clearly had "discovered" the cause of his injury--and understood it well enough to seek redress. Even if the injury caused by the VA's alleged malpractice caused Barnhart to develop a specific fear of the VA, thereby preventing him from suing the VA within the applicable time period, the injury clearly did not prevent him from discovering and understanding the cause of that injury. That Barnhart did proceed with a different legal

action puts to rest any issue as to his general capacity to bring a legal action. Cf. Crawford, 796 F.2d at 930. Thus, as in Crawford, we once again leave to another day the issue whether severe mental incapacity tolls the administrative statute of limitations under the Federal Tort Claims Act. [4]

iii.

We do not here foreclose the possibility that a mental disability preventing a plaintiff from discovering or

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[4] 4 We similarly do not reach the issue whether legal incapacity sufficient to toll the section 2401(a) statute of limitations might toll the 2401(b) statute, because there is no sound basis in the documents submitted for concluding that Barnhart was in any way legally incapable prior to 1988 (at which time a guardian ad litem was appointed). Indeed, as Judge Barker observed at the hearing, the indications are to the contrary, for Barnhart was deemed capable of proceeding as a plaintiff in a lawsuit, without any guardian, during that time.

understanding the cause of an injury (or rendering him or her entirely incapable of bringing a legal action) might toll the statute of limitations in similar cases. However, where the disability at most erodes or impairs a plaintiff's desire to proceed with a recognized cause of action, we can find no support for permitting an exception.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
CAUSE NO. IP 88-274-C

STEPHEN BARNHART,

Plaintiff,

VS.

UNITED STATES OF AMERICA,

Defendant.

ENTRY

This matter is before the court on a motion for summary judgment filed by the defendant, United States of America, on July 20, 1988. The plaintiff, Stephen Barnhart, responded on August 8, 1988, to which the government replied on August 17, 1988. A hearing on the motion for summary judgment was held on November 7, 1988. For the reasons set forth below, the defendant's motion is GRANTED.

Background

The plaintiff, Stephen Barnhart, who was born on March 15, 1949, served in the United States Army from September 1967 through March 1968. Near the end of his military service, Barnhart suffered a psychotic episode and was diagnosed as schizophrenic by Veteran's Administration ("VA") hospital personnel. Over the next twelve years, with only occasional breaks, Barnhart was treated for his condition with large doses of anti-psychotic medication prescribed at various VA facilities. Although most of Barnhart's hospitalization occurred at a San Diego, California, VA hospital, he also received treatment at Louisville and Lexington, Kentucky. The medication taken by Barnhart in accordance with doctors, instructions consisted primarily of Thorazine, but also included other neuroleptic drugs such as

Mellaril, Prolexin, Haldol, Taractin and Stelazine. Administered to Barnhart in doses reaching 400 to 800 milligrams a day, the medication was used to control his psychotic behavior. Unfortunately, as a result of being given large doses of tranquilizers over long periods of time, Barnhart developed an affliction known as tardive dyskinesia.

Tardive dyskinesia, identified and documented as such since approximately 1973, is an irreversible neurological disorder induced by ingestion of major tranquilizers for extended periods of time. The disease may reverse itself if drug therapy is immediately terminated upon the onset of its symptoms. If drug therapy is discontinued and the symptoms persist, the symptoms will become permanent. They include a slight quivering of the tongue, loss of voluntary

musculature, including the muscles of the face, head, neck, limbs, hands, feet and torso. Respiration and swallowing also may be affected. The disease may also cause abnormal spasms, tics, contortions and bizarre slow, writhing movements. Although the symptoms range in severity, the disease can become totally disabling and is very disfiguring, even in mild forms.

In an affidavit, Dr. Peter Breggin, a psychiatrist, testified that he examined the plaintiff on March 1, 1986, reviewed patient records, and talked with the plaintiff and his mother in numerous telephone conversations. He noted that the plaintiff exhibited symptoms of mental deterioration typical of organic brain disease associated with tardive dyskinesia. Dr. Breggin observed the following symptoms in plaintiff:

difficulty concentrating and focusing attention; difficulty planning ahead and anticipating the future or handling complex decision-making; short term memory impairment and retrograde amnesia; and emotional instability, especially increased irritability. Breggin further opined that these symptoms have severely impaired the plaintiff and rendered him unable to exercise control over his own legal interests since the diagnosis of tardive dyskinesia. With regard to the plaintiff Is underlying schizophrenia, Dr. Breggin stated that the plaintiff's schizophrenia is 'in remission,' meaning that the more severe manifestations of the disease are no longer present. However, some of the plaintiff's schizophrenic symptoms have remained, including paranoia, irrational fear of the VA, and extreme personal helplessness with

a passive-dependent character.

Currently, Barnhart is rated by the VA as having a 100% service-related disability, consisting of schizophrenia and tardive dyskinesia. He receives disability payments for his support and the support of his mother, with whom he lives. Barnhart is considered competent by the VA.

It is undisputed that neither the plaintiff nor his mother, with whom he resided, were initially advised that the plaintiff was suffering from tardive dyskinesia. It was not until the plaintiff was examined by Dr. Charles Rehn in a neurological consultation that the condition became known. Dr. Rehn, in a letter written on July 13, 1983, stated that he had seen the plaintiff and concluded that "[h]e has severe tardive dyskinesia from major tranquilizer

treatment for schizophrenia in the past.' In the letter, Dr. Rehn related that he discussed at length the plaintiff's case with the plaintiff's attorney. The letter also indicates that a copy was sent to plaintiff's attorney.

On March 22, 1985, the plaintiff filed an action in federal district court against Smithkline Beckman Corporation ('Smithkline Beckman'), a manufacturer and seller of the drug Thorazine. In that action, plaintiff alleged that he developed tardive dyskinesia and other conditions as a direct result of taking the Thorazine manufactured and sold by Smithkline Beckman. The action was subsequently settled.

On February 2, 1987, the plaintiff filed an administrative tort claim with the VA. In his claim, the plaintiff alleged that the VA's negligent medical care resulted

in the development of tardive dyskinesia. On January 19, 1988, the VA denied the claim on the grounds that it had been untimely filed.

The plaintiff then filed, on March 8, 1988, the complaint in this action against the defendant United States. He alleges that he developed tardive dyskinesia as a result of the VA's negligent medical care. The government has responded with its motion to dismiss, maintaining that the plaintiff's action is barred because the plaintiff's administrative tort claim, which is the prerequisite to his judicial action, was not filed in a timely manner.

Discussion

The court notes at the outset that the government has requested to transform what is captioned its motion for summary judgment into a motion to dismiss for lack of subject matter jurisdiction. Fed. R.

Civ. P. 12(b)(1). The court accedes to the government's request to treat the motion as a motion to dismiss, agreeing that the statute of limitations under the Federal Tort Claims Act is a jurisdictional issue which must be resolved before proceeding to trial. Crawford v. United States, 796 F.2d 924, 927-28 (7th Cir. 1986). Accordingly, the court now turns to the issue to be resolved and a determination of the motion to dismiss.

It is well-established that the United States enjoys immunity from suit unless it specifically consents to be sued. United States v. Kubrick, 444 U.S. 111, 117-18, 100 S. Ct. 352, 357, 62 L.Ed.2d 259 (1979); Soriano v. United States, 352 U.S. 270, 276, 77 S. Ct. 269, 273, 1 L.Ed.2d 306 (1957). Congress may, if it deems appropriate, impose certain limitations and conditions on its waiver

of sovereign immunity. United States v. Testan, 424 U.S. 392, 399, 96 S. Ct. 948, 953-54, 47 L.Ed.2d 114 (1976).

The Federal Tort Claims Act constitutes such a waiver of immunity by creating a right to recovery from the United States for the tortious conduct of its agents. However, this waiver is not without limitations and conditions. Specifically, the Act provides that, as a condition precedent to filing an action against the government, the claimant must first present his claim to the appropriate federal agency for administrative review and resolution, if possible. 28 U.S.C. S 2675. Congress also imposed the following temporal limitation: 'A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues.' 28 U.S.C.

section 2401(b). In the case at bar, the government challenges the plaintiff's entitlement to sue the United States, charging that his claim was filed after two years from the time the claim accrued and thus is barred by section 2401(b).

In determining whether the plaintiff's claim is, indeed, precluded, the court notes that because the Act is founded upon a waiver of sovereign immunity, the court must strictly construe the limitations provision. Soriano, 352 U.S. at 276, 77 S. Ct. at 273, 1 L.Ed.2d 306. The court is not free to extend the period of the waiver beyond that which Congress adopted. Kubrick, 444 U.S. at 117-18, 100 S. Ct. at 357, 62 L.Ed.2d 259.

In Kubrick, 444 U.S. at 121, 100 S. Ct. at 358, 62 L.Ed.2d 259, the United States Supreme Court construed the limitations period and determined that an

action under the Act does not accrue until the plaintiff discovers or should have discovered, in the exercise of reasonable diligence, the injury and its cause. This approach is referred to as the 'discovery rule' and the court is bound to apply this interpretation of the statute to the plaintiff's claim.

The plaintiff does not contend that the discovery rule is inapplicable to his claim. Rather, he urges the court to recognize an exception to the rule that allows for equitable tolling of the limitations period. The court now turns to plaintiff's contention that the theory of equitable tolling is applicable to his claim.

Generally, the grounds for tolling federal statutes of limitations are more limited in suits against the government than in suits between private litigants. Swietlik

v. United States, 779 F.2d 1306, 1311 (7th Cir. 1985). Cognizant of the need to strictly interpret the limitations and conditions upon which the government consents to be sued, courts have rarely allowed statutes of limitations to be equitably tolled. Crawford v. United States, 796 F.2d 924, 926 (7th Cir. 1986). For example, courts have refused to toll statutes of limitations when a plaintiff had a guardian or conservator to conduct his legal affairs, or was prevented from filing suit by war or infancy. See, e.g., Soriano, 352 U.S. 270, 77 S. Ct. 269, 1 L.Ed.2d 306 (1957) (war); Jastremski v. United States, 737 F.2d 666, 669 (7th Cir. 1984) (infancy).

The statute of limitations contained in the Federal Tort Claims Act provides that a civil action must be filed within six years after the claim accrues. 28

U.S.C. section 2401(a). Section 2401(a) also includes an express tolling provision which grants "any person under legal disability" at the time his claim accrues three years in which to file suit after the disability ends. id. Section 2401(b), which provides a two year limitation for filing an administrative claim, omits any reference to legal disabilities as a basis for tolling the limitations period. This omission has led some courts to conclude that section 2401(b) cannot be tolled by a legal disability such as insanity. See, e.g., Casias v.United States, 532 F.2d 1339, 1342 (10th Cir. 1976) (and cases cited therein).

The Seventh Circuit has not decided this question, but noted in Crawford, 796 F.2d 924, that at most the law is not clear as to whether the administrative statute of limitations may be tolled by a legal incapacity. 796 F.2d at 926. The court stated, "[A]s far as we know there is no such thing as being legally incapable of filing an administrative claim; so maybe the omission of any reference to legal disability in subsection (b) should not be taken to foreclose an appeal to some notion of or akin to equitable tolling.' Id. On the basis only of this judicial aside in Crawford, this court does not feel confident ruling on the effect of the discrepancy between subsections 2401(a) and (b), particularly when such a determination is unnecessary to a resolution of the instant dispute. Even if

the court were to conclude that section 2401(b) gave rise to a theory of equitable tolling, application of that theory in this case would be inappropriate for the reasons discussed below.

The determination of whether a statute should be tolled depends on an analysis of the particular circumstances of each case. Although there exists no absolute rule of tolling on insanity grounds, courts have generally held that a disability due to mental incompetency does not toll the running of a federal statute of limitations such as section 2401(b). See Casias, 532 F.2d at 1342. Under section 2401(b), the cases that recognize equitable tolling for certain mental disabilities rely on the "discovery" rule. Those cases making an exception to the rule
against tolling hold that when the

claimant's mental condition is allegedly caused by the defendant's tortious conduct and directly prevents him from discovering the nature and cause of his injury, the statute of limitations is tolled. See Washington v. United States, 769 F.2d 1436, 1438-39 (9th Cir. 1985); Clifford v. United States, 738 F.2d 977 (8th Cir. 1984); Zeidler v. United States, 601 F.2d 527, 531 (10th Cir. 1979); Dundon v. United States, 559 F. Supp. 469 (E.D.N.Y. 1983). In each of the cases cited, the brain damage or destruction caused by the defendant prevented the plaintiff from discovering his or her injury; thus, the statute was tolled until the injury was discovered by the claimant himself or by an individual assuming a legal duty to act for the claimant. See Clifford, 735 F.2d at 980 (statute began running when guardian was appointed for comatose

patient); Zeidler, 601 F.2d at 531 (statute was tolled by the plaintiff's inability to discover malpractice due to lobotomy operations performed by the government); Washington, 796 F.2d at 1439 (comatose patient's claim accrued at her death); Dundon, 559 F. Supp. at 475 (statute tolled during the period in which the patient lay comatose).

In this case, the plaintiff argues that the tardive dyskinesia rendered him mentally incompetent. He asserts that the VA was responsible for his incompetence because VA personnel administered the offending tranquilizers to plaintiff. He contends that this incompetence contributed, at the very least, to his irrational fear of proceeding against the VA. The plaintiff further maintains that his incompetence deprived him of the ability to consent to the filing of a

claim until February 1987. Therefore, plaintiff argues, the tolling exception is applicable.

Although the plaintiff's plight is truly regrettable, it cannot survive the statute of limitations bar on the theory of equitable tolling, even within the exception carved out by other circuits. Unlike the cases recognizing the exception to the discovery rule, the facts in this case reveal a different type of mental disability. Here, the plaintiff suffered from a form of mental illness associated with the condition the plaintiff alleges was caused by the defendant's malpractice, rather than from a type of brain destruction or incompetency which results in a comatose condition or in a complete failure to comprehend anything. In contrast to a comatose or other nonfunctional patient, the plaintiff was

functional, albeit at a reduced level, was cognizant and able to exercise certain of his legal rights, as evidenced by his pursuit of the companion litigation against the manufacturer of the medication. Accepting plaintiff's claim that his mental illness may have interfered with his ability to make rational decisions, it did not render him totally incompetent.

The facts further reveal that, though there was some evidence of prior diagnosis of plaintiff's condition, it was specifically disclosed on March 17, 1983, by Dr. Charles Rehn, a neurologist who had examined the plaintiff, and in a letter to plaintiff's attorney and his treating physician, dated July 13, 1983, stated that the plaintiff 'has a severe tardive dyskinesia from major tranquilizer treatment for schizophrenia in the past."

(The plaintiff's attorney received a copy of Dr. Rehn's opinion.) The plaintiff was also told in 1983 that his condition was caused by prolonged ingestion of tranquilizers.

The court finds that this notice constituted a discovery sufficient to trigger the running of the limitations period. That the discovery was then followed by a period of mental illness associated with the condition the plaintiff alleges was caused by defendant's malpractice does not establish that the plaintiff was incompetent to discover his injury. Instead, the plaintiff's failure to file a claim within the limitations period resulted not from his failure to discover his injury but from his refusal to pursue his claim.

It is immaterial to the ruling in this case that the plaintiff's refusal to

file a claim against the VA stemmed from his fear of offending the agency, upon whom he felt totally dependent. Plaintiff's fears were explained on the basis of his psychiatric disorder as well as his actual experiences with the VA. Although the court recognizes that plaintiff's paranoia may have contributed to his refusal of authority to his attorney to bring a legal action, it did not prevent his discovery of the nature and cause of his injury. This is the only test which controls a determination of when the action accrued, and it is the only test for obvious reasons. One could readily foresee that a tort could be discovered but go unpursued for a multitude of good, persuasive reasons and could continue unpursued for indefinite periods of time, which, if allowed to extend the filing period would swallow the

entire purpose and effect of the limitations on the waiver of sovereign immunity.

The plaintiff's refusal in this case to file his claim due to mental illness simply cannot be equated with a failure to discover the injury based on mental incompetency or destruction of brain functions. Because the equitable tolling exception to the discovery rule recognizes only the latter situation, it does not apply to these facts and thus does not afford a basis for resisting the motion to dismiss.

Thus, despite the distressing circumstances in which plaintiff finds himself because of his afflictions, the court is compelled to hold that the plaintiff's claim accrued when he discovered the cause of his injury in 1983. Under section *2401(b), the

plaintiff should have filed his claim with the VA by July 13, 1985, two years from the date of Dr. Rehn's letter or receipt of same by plaintiff's attorney. The plaintiff did not file his claim with the *VA until February 1987, a date clearly beyond the two year limitations period. The plaintiff is, therefore, barred from seeking redress against the defendant under the Federal Tort Claims Act.

This court pauses to observe with some regret the apparent harshness of its ruling in light of plaintiff's sad circumstances. The court is bound, however, by the principles of law, including the rule of sovereign immunity which requires strict construction and rigid application. If the court were to interpret the statute so to find an exception allowing otherwise untimely claims of a plaintiff who has no legal

guardian and who is mentally ill but legally competent, simply because of those circumstances, such claims could be potentially actionable indefinitely. Such a result would foreclose any possibility of repose for the government, clearly in contradiction of the statutes which govern these issues. It is impossible in this court's view to conceive that Congress would reasonably have intended such a result when it originally enacted so limited a waiver of sovereign immunity. The defendant's motion to dismiss is, therefore, GRANTED.

Conclusion

The court finds that the plaintiff's claim under the Federal Tort Claims Act is barred by the two year administrative statute of limitations provided in section 2401(b). The court GRANTS the defendant's motion to dismiss pursuant to Rule 12(b)(1),

Fed. R. Civ. P.

It is so ORDERED this 28th day of November, 1988.

/s/_____
Sarah Evans Barker, Judge
United States District Court
Southern District of Indiana

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

October 17, 1989

No. 88-3402
STEPHEN BARNHART,
Plaintiff-Appellant,
V.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Indiana,
Indianapolis Division.

No. IP 88-274-C-**Sarah Evans Barker, Judge.**

ORDER

On September 14, 1989, appellant, Stephen Barnhart, filed a petition for rehearing in the above-entitled cause.all of the judges on the original panel have voted to deny the petition. Therefore, the petition for rehearing is DENIED.